No. 5742

United States Circuit Court of Appeals

For the Ninth Circuit.

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

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STATEMENT OF THE CASE

This is an appeal from a judgment on conviction of defendant charged in five counts of an information with sale, manufacture, possession of property designed for the manufacture and possession of intoxicating liquor, and maintaining a common nuisance.

By agreement of parties, a jury having been waived, the cause was tried to the Court. (Tr. 6.)

It appears from the testimony that Federal Prohibition Agents F. S. Chase and James J. Maloney went to

a ranch south-west of Silver Bow, Montana, on February 22nd, 1928, and bargained with the defendant Paul Fall for forty gallons of moonshine whiskey, at $5.50 a gallon, and made a deposit of $5.00 on the same, taking a sample of one pint, and also each drank one drink of whiskey in the house. (Tr. 25-27.) Maloney testified that the defendant Fall said, "That he did not have the whiskey there and that he would have to get it from the cache, and for us to come back the next day." (Tr. 27.)

Defendant Fall, testifying in his own behalf, admitted that he had given the Agents a drink of whiskey and had bargained with them for the sale to them of thirty-five or forty gallons of whiskey. He states that the pint of whiskey was given to the Agents upon the representation that someone was sick, and that when the Agents left, a five-dollar bill was found on the wash-stand in the house. (Tr. 30-34.) Defendant's wife testified to substantially the same effect. (Tr. 34-36.) The Agents denied that any representation had been made that either of them was sick. (Tr. 37-38.)

Agent Maloney thereafter appeared before J. H. Brass, United States Commissioner, and made affidavit to the effect that on September 22nd, 1928, he bought one pint of moonshine whiskey from Paul Fall, who was in charge of a ranch with a small building, used for a residence, about five miles in a westerly direction from the town of Silver Bow, State of Montana, and that said Paul Fall was keeping a quantity of intoxicating liquor about the premises, and that Paul Fall bears the reputation of being a person who keeps and sells intoxicating liquors unlawfully, and that said place bears a reputation of being

a place where intoxicating liquors are sold. (Tr. 40-41.)

This affidavit was presented to L. M. Van Etten, U. S. Commissioner, by Ben Holter, together with his complaint on oath and thereupon the warrant was issued. (Tr. 42-45.)

Prohibition Agent Holter, with others, served the warrant on the same day, and searched the defendant's premises, and he testified, "We first searched the house, a one-room frame, and we found some whiskey in there and took samples of it. There was only a small quantity in a keg. We then searched the dugout, some little distance from the house, and found there two stills set up complete. One a forty-five gallon, and one a sixty gallon; about six hundred gallons of mash, two three-hundred gallon vats, some kegs, burners, and pressure tanks complete, and about thirteen gallons of moonshine whiskey." (Tr. 28)

ARGUMENT

The Judgment on Count One Must Be Sustained

The judgment on conviction under count one of the information for unlawful sale of intoxicating liquor must be sustained notwithstanding a joint sentence was imposed under count one and two (which charges unlawful manufacture) even if the evidence supporting count two were suppressed.

Appellant contends that the search warrant is bad, the search illegal, and,

> "That as a consequence there could have been no conviction upon either of counts 2, 3, 4 or 5 of the

> information *and as a consequence also the sentence pronounced jointly upon counts* 1 *and* 2 *of the information is erroneous and must be reversed.*" (Brief, p. 8)

There is no contention that the conviction on the first count was erroneous or the evidence insufficient, but simply the assertion that since the first count charges sale of intoxicating liquor on September 22, 1928, while the second count charges manufacture of intoxicating liquor on October 25th, 1928, if the evidence were suppressed supporting the conviction for manufacture, then the judgment must also be reversed as to the conviction for sale.

No authority is cited in support of this proposition, and we submit that it is not the law.

In this case a single sentence of four months was imposed on counts one and two of the information. (Tr. 7.)

The National Prohibition Act provides for the following punishment for unlawful manufacture and sale of intoxicating liquor.

> "Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000 or imprisoned not exceeding six months." * * * 27 U. S. C. A. 46.

We respectfully submit that since the sentence imposed for the two counts does not exceed the punishment which could have been imposed on count one alone, the sentence under count one must be sustained though the evidence supporting count two were suppressed.

In Claassen v. United States, 142 U. S. 140 at 146 it is said:

"In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' Peake v. Oldham, Cowper, 275, 276; Rex v. Benfield, 2 Bur. 980, 985. See also Grant v. Astle, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment, on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. Locke v. United States, 7 Cranch, 339, 344; Clifton v. United States, 4 How. 242, 250; Snyder v. United States, 112 U. S. 216; Bond v. Dustin, 112 U. S. 604, 609; 1 Bishop Crim. Pro. Section 1015; Wharton Crim. Pl. & Pract. Sec. 771."

And in Kuehn v. United States (9th Cir.) 8 F. (2d) 265 this court said:

"Where conviction is had upon more than one count, the sentence, if it does not exceed that which might be imposed on one count, is good if that count is sufficient."

The same rule is applicable where the evidence is insufficient to support one of the counts as would be the case herein if the search warrant were held invalid. Thus, in Gee Woe v. United States (5th Cir.) 250 Fed. 428, the court said:

"The plaintiff in error also contends that the

evidence did not warrant a conviction upon the third count, which charged him with being a dealer, and not having registered, and paid the special tax, and being in possession of the three tins of opium. *As the sentence was within the competency of the District Court to impose for the offense charged in the first count, it would be referred to that count, if the third count were held to be unsupported by the proof.* (Italics ours.)

There Was Probable Cause to Issue a Search Warrant

The fact that Maloney's affidavit was not sworn to before the commissioner who issued the warrant does not render it defective.

Appellant contends that the search warrant was improperly issued because the supporting affidavit of James J Maloney (Tr. p. 40-41) was not subscribed and sworn to before L. M. Van Etten, the Commissioner who issued the warrant.

An examination of the Federal cases cited does not indicate that such is the law in the Federal Courts.

It is true that People v. Fons (Mich.) 194 N. W. 543 is contra but no precedents are cited as authority in that case and the case has not been cited in support of this proposition in any other jurisdiction so far as we have found.

This affidavit was presented to L. M. Van Etten on October 25th, 1928, by Federal Prohibition Agent Ben Holter, together with a complaint, in which he stated on oath, "That he has just and probable cause to believe and does believe, that intoxicating liquor is now unlawfully manufactured, kept for sale, and sold" on the de-

fendant's premises; that his reasons for his belief are that "he has been heretofore informed that intoxicating liquor is unlawfully manufactured, kept for sale and sold" on defendant's premises, and that "applicant has procured an affidavit from James J. Maloney, setting forth that on the 22nd day of September, 1928, he, the said James J. Maloney, was within said premises and purchased one pint of moonshine whiskey from Paul Fall, for which he paid the sum of $5.00," (Tr. 38-40) and thereupon the warrant was issued. (Tr. 42-45.)

We admit that the sworn complaint of Ben Holter would have been subject to the objections directed against the affidavits in those cases cited by appellant, because based on information and belief. However, when supported by the affidavit of Maloney, positive in form, we submit that as a matter of law there was probable cause to justify the issuance of a search warrant.

There is no question that the commissioner must have probable cause for the issuance of a search warrant supported by oath.

In United States v. Borkowski, 268 Fed. 408 at 410, the Court said:

> "A search warrant may issue only upon probable cause, supported by oath or affirmation. The question of probable cause must be submitted to the committing magistrate, so that he may exercise his judgment as to the sufficiency of the ground for believing the accused person guilty. 25 Am. & Eng. Ency. Law, 147 et seq. The United States commissioner, or any other officer with whom an affidavit is filed, may not, simply because such affidavit is presented,

> issue a warrant. The affidavit must itself be sufficient, must state facts which justify the issuance of a warrant and the commissioner or such other officer is required by law to satisfy himself of the sufficiency of the affidavit and that the circumstances call for the issuance of a warrant."

However, we submit that it is not necessary that one making an affidavit positive in form appear in person before the commissioner and we have found no case in the Federal Courts which so holds, altho several cases have facts similar to the case at bar.

In Hurley v. United States, 300 Fed. 75 at 76, the facts were similar to those in the instant case. The Court said:

> "We find no merit in the contention that the commissioner acted in an authorized manner in finding probable cause for issuing a warrant. It was applied for by a prohibition agent, *accompanied by the affidavit of a police officer in the city of Worcester. * * * The affidavits filed with the commissioner fully met the requirements of the statutes and the facts disclosed in them were sufficient to authorize the commissioner to find probable cause.*" (Italics ours.)

In Gerahty v. United States (4th Cir.) 29 F. (2d) 8 the court apparently approved the practice here followed:

> "The search warrant was issued upon affidavit alleging a sale, and was supported by the affidavit of a prohibition enforcement officer." * * * *
>
> "The two affidavits upon which the warrant was issued were clearly sufficient."

Also see Levee v. United States, 29 F. (2d) 187.

In United States v. Kips Bay Brewing & Malting Co. (2nd Cir.) 29 F. (2d) 837, it was held that though certificate of government's chemist as to alcoholic content was not verified it was sufficient to support affidavit for search warrant.

The case of Hawker v. Queck (3rd Cir) 1 F. (2d) 77 is identical with the case at bar. There a prohibition agent appeared before the United States Commissioner and made an affidavit alleging "That he has good reason to believe that in and upon the premises of Harry P. Queck, at 705 Amity Street, in the borough of Homestead, Pennsylvania, there has been and is now located and concealed a large amount of intoxicating liquor and that the information obtained by your affiant in relation to the sale of liquor by the said Harry P. Queck on the 26th day of June A. D. 1920, was obtained from affidavits made by William McClelland and Nelson Gibson." The affidavits of McClelland and Gibson were sworn to before a notary public two weeks or more before the search warrant was issued. The Court said:

> "Do the affidavits in question show probable cause? We are of opinion they do. Two men had lately visited the hotel of Queck, had each bought and paid for whiskey, and had each brought away separate samples, which they preserved. The premises were described, the street number given, and the date and hour of purchase specified. These were facts, not inferences, and showed probable cause for the issue of a search warrant, and in view of them we think the petitioner failed to show the search of

Queck's premises and the taking of the liquor found upon them was an unreasonable search and seizure." * * * * "We may further state that, while it was suggested at the argument that there was nothing to show that the affidavits of McClelland and Gibson were produced before the commissioner, we may add that, apart from the affidavits themselves being in the printed record, and the reference to them, both in the affidavit of Connor taken before the commissioner and in the warrant itself, the court at bar inquired of counsel as to the facts, and later on was furnished with information that Gibson's and McClelland's affidavits had been before the commissioner when he issued the warrant, and before the court when it passed on its legality."

"Being of opinion, then that the record papers before the commissioner and the court showed probable cause for the issue of the warrant, the decree below, holding it invalid, is reversed and the cause is remanded, with directions to dismiss the petition." 1 F. (2d) 77 at 80.

This court approved Hawker v. Queck, supra, in Nordelli v. United States (9th Cir) 24 F. (2d) 665, saying:

"In Hawker v. Queck (C. C. A.) 1 F. (2d) 77, it was held that an affidavit by a prohibition agent that he had good reason to believe and did believe that on premises designated liquor would be found, and that his information was obtained from affidavits made by named persons, which were before the magistrate and which showed the purchase of whiskey, was held sufficient to show the existence of probable cause to legalize a warrant. Certiorari was denied. 266 U. S. 621, 45 S. Ct. 99, 69 L. Ed.

472."

The cases cited by appellant are not authority for the proposition that the failure of one making a positive affidavit to personally appear before the commissioner vitiates a search warrant issued thereon. On the contrary, in each of these cases the court was considering the sufficiency of the averments in the affidavit.

Thus in Siden v. United States, 9 F. (2d) 241, the *affidavit* was *insufficient* and the court said:

> "Without a statement in those affidavits, depositions, or testimony of facts sufficient to sustain such a conclusion, the search warrant may not lawfully issue. The statement of the sustaining facts showing probable cause is as indispensable to the lawful issue of a search warrant as the legal conclusion that such cause exists. When the facts on which the magistrate's conclusion of probable cause is based are not stated in the affidavits, depositions, or testimony on which the conclusion rests, the warrant cannot be sustained, because there is no criterion by which a court can determine whether or not there were facts showing probable cause, and the unavoidable legal conclusion is that there were not." * * * * "The belief of Mr. Benson that he had reason to believe and did believe that liquor was being sold by the defendant was not a fact showing probable cause for a magistrate to find or adjudge that he was so doing. It was only a thought or guess of Mr. Benson."

In United States v. Kelih, 272 Fed. 484 the affidavit stated "affiant has reason to believe that there are illegally manufactured liquors and an illicit still now concealed in or on said premises". The court said:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath —not suspicions, *belief or surmise.*" (Italics ours.)

In Veeder v. United States, 252 Fed. 414 the affidavit was held insufficient which stated in effect "affiant has good reason to believe and does believe" etc.

In Giles v. United States, 284 Fed. 208 the affidavit said in effect "the law is being violated by the illegal possession of intoxicating liquor" which was held insufficient.

To the above cases may be added many other cases in which the courts hold that affidavits based on a mere belief are insufficient but in *none* of them is it said that an affidavit, positive in form, would be insufficient simply because not subscribed and sworn to before the commissioner issuing the warrant.

The cases rather indicate that *the sufficiency of the averments* of the affidavit are the matter in issue—not whether or not the affidavit must be disregarded in the absence of the deposing party before the commissioner.

Thus, in Lochnane v. United States (9th Cir) 2 F. (2d) 427 this court said:

> "It is fundamental that * * * before a judicial officer is authorized to issue a search warrant *he must have before him, by affidavit or deposition,* the facts tending to establish the grounds of the application, or probable cause for believing that the facts exist." (Italics ours.)

We submit that since in the instant case the commissioner was presented with an affidavit, positive in

form, showing a sale of liquor on the premises there was as a matter of law probable cause for the issuance of a search warrant.

The Description is Sufficient

The description of the premises in the search warrant was sufficiently particular.

The description as set forth in the search warrant is:

> "A ranch with small building used for residence, located about 5 miles in a westerly direction from the town of Silver Bow, Montana." (Tr. p. 43.)

The rule for determining whether the description of the premises is sufficient is declared in Steele v. United States, No. 1 267 U. S. 498 at 503 where it is said:

> "It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended. Rothlisberger v. United States, 289 Fed. 72; United States v. Borkowski 268 Fed. 408, 411; Commonwealth v. Dana, 2 Metc. 329, 336; Metcalf v. Weed, 66 N. H. 176; Rose v. State, 171 Ind. 662; McSherry v. Heimer, 132 Minn, 260."

We submit that the description is sufficiently particular in the instant case upon the record before the court. There is nothing in the record to indicate that there is any other ranch located "about 5 miles in a westerly direction from the town of Silver Bow, Montana." Counsel for appellant has injected into his brief the statement:

> "Many ranches could *no doubt* be found within

> a distance of about five miles in a westerly direction from said place." (Brief p. 10.)

but the record does not support this assertion, and while it is true in Laugter v. McLain, 229 Fed. 280, a District Court held that judicial notice would be taken "that there are school houses 4 miles from Memphis" by the same sign the District Court in the instant case may have taken judicial notice that there were no other ranches that could fit the description in the search warrant herein.

The defendant testified:

> "My name is Paul Fall. I am a rancher, and I live on a ranch near Silver Bow Junction, in Silver Bow County, Montana, and I have lived there for the last past fifteen years. My wife and family live with me in my residence, located on said ranch and we have a small dwelling house." (Tr. p. 30-31.)

In Metcalf v. Weed, 66 N. H. 176 cited by the Supreme Court in the Steele case supra, the court said:

> "The description of the place as 'the premises now occupied by Parker Metcalf situated in Haverhill' is not upon its face insufficient. *It is a question of fact, determinable at the trial term, whether it designates the place with reasonable certainty.*" (Italics ours.)

Since there is no evidence in this case that there is any other ranch that fits the description it follows that the description is sufficient in this case.

It is true that if a description is such as would permit the officers to search a number of places, the description is not particular. An example of such a situation

is disclosed in U. S. v. 2615 Barrels, more or less, of Beer, 1 F. (2d) 500 at 502, where the court said:

> "The further consideration presents itself that the premises directed to be searched, * * * is, * * found to consist of * * * not only the three-story brick building occupied for brewery purposes, but also one one-story grocery and meat store, one double brick dwelling house, and five frame dwelling houses, all of said buildings and houses being occupied solely by private families exclusively from the brewery, and are the property of others * * * * *." * * "If the place described by street and number is used by a number of persons for different purposes, then it is not a place; but there are several places included in the one description. * * * It is then a general but not a particular description."

But in this case there is no evidence that such was the case, and the situation is similar to that in Rothlesberger v. United States (6th Cir) 289 Fed. 72 where the search warrant gave an erroneous street number reciting a certain building number 123 occupied by the Rothlesberger family, when in fact the number was 121 and the court held the description sufficient saying *"There is nothing to show that there was any building No.* 123 *or any room for doubt as to the house intended."* (Italics ours.)

Furthermore a farm need not be described with the particularity of a city residence. Thus in State v. Stough (Mo.) 2 S. W. (2d) 767, the description was:

> "In a certain dwelling house and the premises thereof, and the outbuildings located upon said premis-

es situate about 5 miles west of Rolla, in Phelps County, Mo., said dwelling house being occupied by Aso Stough and his family as their residence."

The Court said:

"It seems neither necessary or practical to describe a farm dwelling in a search warrant with the same degree of particularity as a dwelling house located in a city, town or village, where different families live in the same house and in adjoining houses and where houses may be definitely described by street numbers or by other marks of identification. Considering the location of appellant's dwelling house, it is our conclusion that the description of the same in the search warrant in question is sufficient to meet the requirements of the constitution and the statute as contemplated by the powers thereof."

And in United States v. Borkowski, 268 Fed. 408, 411 the Court said:

"In describing the place to be searched, it is sufficient if the officer to whom the warrant is directed is enabled to locate the same definitely and with certainty. This does not necessarily require the exact legal description to be given, such as ordinarily appears in deeds of record in the county recorder's office. The description may be such as is known to the people and used in the locality in question, and by inquiry the officer may be as clearly guided to the place intended as if the legal record description were used."

In United States v. Nadeau (D. C.) 2 F. (2d) 148 quoting from syllabus:

> "Affidavit describing premises to be searched as 'second house on north side of Duvall-Monroe highway and west from highway bridge over Skykomish river in Snohomish county, state of Washington,' used and occupied by parties previously described, *held* to sufficiently identify the premises, in absence of particular description."

In Bradley v. State (Miss.) 98 So. 458 the description was "a certain room or building and all out houses occupied by James or Zeko Bradley, situated in Forrest County, Miss." The Court held the description sufficient, saying:

> "We think the warrant and the affidavit sufficiently describe the premises to be searched. There is some difference among the authorities as to what is a sufficient description of the premises to be searched, and some of the courts have held that the description must be as specific as a description in a conveyance of real estate. Others have held that any description that will enable the officer to locate the premises definitely and with certainty is sufficient, and we think this view is the better one. A description may be one used in the locality and known to the people, if it is sufficiently suggestive that an officer by reasonable inquiry may locate with certainty the place to be searched."

In People v. Lienartowicz (Mich.) 196 N. W. 326 a description in effect—"The dwelling of William Lienartowicz in the city of Gaylord, county of Otsego, state of Michigan" was held sufficient.

In State v. Whitecotten (W. Va.) 133 S. E. 106 a description "that certain farm and dwelling house and

all outbuildings on said farm, said farm is located in Sand Hill District, and known as Thomas J. Earlimine farm, in Marshall County, W. Va." was held sufficiently particular.

In Buis v. Commonwealth (Ky.) 266 S. W. 895, the description was:

> "The house now used and occupied by Oscar Buis as a residence, buildings and premises adjacent thereto. Said residence situated in Cosey County, near Humphrey, Ky."

The Court said:

> "Cosey County is a farming district, and has but few towns. The location of Humphrey, Ky., in that county is well known. When the officer to whom the warrant was issued received it, he at once knew where the residence of Oscar Buis was located; or if he did not know the exact building, he had all the information he should have in order to find the residence of Oscar Buis."

However, counsel calls attention to the fact that the description does not describe the place to be searched as owned or occupied by the defendant. (Brief p. 10.) However, as was said in United States v. Camarota 278 Fed. 388:

> "It is not necessary that the search warrant name a particular person; the name of the place to be searched is sufficient."

And in Petition of Barber, 281 Fed. 550 at 554, it is said:

> "As it is not claimed that any person was to be searched under this warrant, or in fact was searched, it was, of course, unnecessary to name or describe any person. * * *"

Also see Barrett v. United States (6th Cir) 4 F. (2d) 317, and United States v. Callahan, 17 F. (2d) 937.

The Affidavit Was Sufficient to Show Probable Cause

The affidavit upon which the warrant was issued is not too remote to show probable cause for the issuance of the warrant.

In Giles v. United States (1st Cir.) 284 Fed. 208 at 214, the Court adopted the following language of the trial court:

> "The finding of probable cause for the issuance of a search warrant is one exclusively for the court or comissioner having the matter in charge."

In United States v. McKay 2 F. (2d) 257 the rule with reference to time is stated:

> "In Section 11, title 11, of the Espionage Act (Sec. 10496¼k), it is provided that 'a search warrant must be executed and returned to the judge or commissioner who issued it within 10 days after its date; after the expiration of this time the warrant, unless executed, is void.' *The absence of such limitation as to the lapse of time between the purchase of liquor and the making of an affidavit indicates that in the opinion of the Congress this was a matter which should be left to the discretion of the judge or commissioner,* who determines whether there is or

is not probable cause . There can be no hard and fast rule fixed by courts to fit every such situation, under all circumstances. Each case must depend upon its own facts. The person or persons who are charged with having whiskey in their possession, the quantity of liquor, and the place where it is kept, may all be taken into account, as well as the alleged sale, and the lapse of time.

Obviously contraband goods are more likely to remain for some time if stored by their owner, a substantial citizen, in his own ware house on the outskirts of a city, than if concealed in a cabin by an unknown stranger." * * * * * "It was for the commissioner to determine whether the showing was sufficient to establish probable cause for believing that intoxicating liquors still were on the premises, and that such premises were still being used for the unlawful sale of liquor December 14th, when the search warrant was placed in the hands of the officers." * * "Furthermore, when the affidavit was signed and sworn to before the commissioner, it became her duty to weigh the evidence to ascertain whether it established probable cause for issuance of the warrant. This she did, and in so doing exercised a judicial function. The affidavit disclosed facts which, if true, were ample to support a search warrant." (Italics ours.)

Appellant cites Siden v. United States (8th Cir.) 9 F. (2d) 241, but in that case it will be noted that the court said:

"If the affidavits on which the search warrant was based had disclosed the fact that this clothing store was a place where substantial quantities of

> intoxicating liquors apparently for sale were kept, or a place where a saloon or place of sale of intoxicants had been or was maintained, and where several sales had been made by the defendant, the commissioner's finding of probable cause might possibly have been sustained."

In this case, the affidavit discloses a sale of one pint of whiskey by defendant to Malony, that the defendant was "keeping stored in and about said premises a quantity of intoxicating liquor"; that the defendant "bears the reputation of being a person who keeps for sale and sells intoxicating liquors"; and that "said place bears the reputation of being a place where intoxicating liquors are unlawfully sold."

So we submit that the evidence before the Commissioner was sufficient to justify the issuance of the warrant at this time. When it appears from the affidavit that the violation is on ranch premises, and that large quantities are stored on the premises, it would seem reasonable to believe that the contraband goods are likely to remain there for some time, and that the violation is more likely to be continuous than in a case where one purchases a drink of whiskey "within a clothing store and nothing is said about the character of the store", as in the Siden case, supra.

And as was said in People v. Halton (Ill.) 158 N. E. 134:

> "The fact that plaintiff in error had sold intoxicating liquor to the affiant constituted just and proximate cause to believe that he would continue to do so for a short period thereafter; and the affiant was

not required to go to the house of plaintiff in error repeatedly to ascertain whether he had ceased to make such sales."

"Objection is also made that the complaint and affidavit supporting the search warrant disclosed only a single sale of a pint of liquor, and that for that reason was void. The sale of a small quantity of intoxicating liquor at a given time in violation of the National Prohibition Act cannot be made with impunity: a person need not have knowledge of repeated sales, or of sales of large quantities of liquor before he is qualified to make a complaint and affidavit upon which a search warrant may be issued."

Having a positive affidavit of unlawful sale on the premises together with positive statements that large quantities of intoxicating liquors were stored on the premises and that the place had a reputation of being a place where intoxicating liquors were sold, together with a sworn complaint of Ben Holter, we submit that as a matter of law there was probable cause for the issuance of the search warrant, at the time the application was made on October 25th, 1928.

For the foregoing reasons we respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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